

**CHAPTER 43**  
**FY 2005 SENIOR OFFICER LEGAL ORIENTATION**  
**CIVILIAN PROTECTIONS IN ARMED CONFLICT**

**TABLE OF CONTENTS**

<b>I.</b>	<b>OBJECTIVES .....</b>	<b>1</b>
<b>II.</b>	<b>DEVELOPMENT OF CIVILIAN PROTECTIONS DURING ARMED CONFLICT .....</b>	<b>1</b>
<b>III.</b>	<b>DEFINITION OF CIVILIAN.....</b>	<b>8</b>
<b>IV.</b>	<b>PROTECTING ALL CIVILIANS IN ALL CONFLICTS .....</b>	<b>14</b>
<b>V.</b>	<b>PROTECTING ALL CIVILIANS IN INTERNATIONAL ARMED CONFLICT .....</b>	<b>18</b>
<b>VI.</b>	<b>STATUS AND TREATMENT OF “PROTECTED PERSONS” .....</b>	<b>20</b>

**MAJ SEAN WATTS**  
**OCTOBER 2004**

**THIS PAGE INTENTIONALLY LEFT BLANK**

# FY 2005 SENIOR OFFICER LEGAL ORIENTATION

## CIVILIAN PROTECTIONS IN ARMED CONFLICT

### I. OBJECTIVES

- A. Familiarity with historical development of protections for civilians during armed conflict.
- B. Understanding of the legal definition of “civilian.”
- C. Understanding of consequences of civilians taking an “active part” in hostilities.
- D. Identify sources of legal protections for:
  - 1. All civilians, in all conflicts;
  - 2. All civilians in international armed conflict;
  - 3. “Protected persons” during international armed conflict.

### II. DEVELOPMENT OF CIVILIAN PROTECTIONS DURING ARMED CONFLICT

- A. **Historical Background.** The concept of protecting civilians during conflict is ancient. Historically, three considerations motivated implementation of such protections.
  - 1. **Desire of sovereigns to protect their citizens.** Based on reciprocal self-interests, ancient powers entered into agreements, followed codes of chivalry, or issued instructions to soldiers in the hope similar rules would protect their own land and people if they fell under their enemy’s control.<sup>1</sup>

---

<sup>1</sup> “On May 18, 1859, at Marengo, Marshal Regnaud de Saint-Jean d’Angely addressed these words to the Imperial Guard: ‘Soldiers of the Guard, . . . you will give the army an example of fearlessness in danger, of order and discipline on the march, of dignity and restraint in the country in which you are engaged. The memory of your own families will make you considerate of the people of the country and will keep alive your respect for property, and

2. **Facilitation of strategic success.** Military and political leaders recognized that enemy civilians who believed that they would be well treated were more likely to surrender and or cooperate with occupying forces. Sparing the vanquished from atrocities facilitated ultimate victory.
3. **Desire to minimize the devastation and suffering caused by war.** Throughout history, religious leaders, scholars, and military professionals advocated limitations on the devastation caused by conflict.<sup>2</sup> This rationale emerged as a major trend in the development of the law of war in the mid-nineteenth century and continues to be a major focus of advocates of “humanitarian law.”

**B. Early Efforts at Civilian Protection** – limits on the conduct of hostilities dating from ancient times to the present have included protections for civilians or “non-combatants.”

1. Ancient Hebrews distinguished protections for civilians belonging to immediate enemies from civilians belonging to remote enemies. Hebrew war customs, drawn from the Bible, permitted a free-hand in dealing with the former, including near genocide, while protecting the latter and their property from arbitrary violence.<sup>3</sup>
2. Greek and Roman warriors placed high value on respect for the “life and personal dignity” of war victims. Protection afforded, however, varied greatly between cultures regarded as equals and those considered primitive or “barbarian.”<sup>4</sup>

---

you may be sure than victory awaits you.” HENRY DUNANT, *A MEMORY OF SOLFERINO* 52, n.1 (Am. Red Cross 1986) (1862).

<sup>2</sup> “War then is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; not as members of their country, but as its defenders. Finally, each State can have for enemies only other States, and not men; for between things disparate in nature there can be no real relation.” JEAN JACQUES ROUSSEAU, *SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT*, Book I, Ch. IV (G. D. H. Cole, trans.) (1762).

<sup>3</sup> 1 *THE LAW OF WAR: A DOCUMENTARY HISTORY*, 4 (Leon Friedman, ed. 1972) (citing *Deuteronomy* 20:10-17).

<sup>4</sup> Christopher Greenwood, *Historical Development and Legal Basis in* *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS*, 13 (Dieter Fleck, ed., 1995).

3. In 1785, the United States and Prussia agreed, in the event of hostilities, to grant immunity from the effects of war to “merchants, women, children, scholars, cultivators, and others.”<sup>5</sup>
4. In 1872, the United States and the Netherlands agreed, in the event of hostilities, to allow a nine-month evacuation period for the citizens of each state, “in all freedom and without hindrance.”<sup>6</sup>

C. **Civilian Protection in the modern *Jus in Bello*** – By the early twentieth century, two methodologies for regulation of the conduct of war developed under international law. The first, the Hague Tradition, developed a focus on limiting the means and methods used in combat. The second, the Geneva Tradition, focused on treatment of war victims in the hands of enemy armed forces. Some writers contest the integrity and significance of the Hague – Geneva bifurcation noting significant overlap between the matters regulated by each.<sup>7</sup> The distinction remains useful, however, within that portion of the law of war dedicated to civilian protection.

1. **The Hague Tradition.** Named for the series of treaties produced at the 1899 and 1907 Hague Conferences, instruments of the Hague Tradition restrict Parties’ conduct of combat operations. The philosophy of the Hague Tradition is best summarized by **article 22** of the Regulations annexed to the Fourth Hague Convention that states, “The right of belligerents to adopt means of injuring the enemy is not unlimited.”
  - a) Most scholars agree that the Hague Regulations have achieved customary international law status, binding even non-parties to the Regulations.<sup>8</sup>

---

<sup>5</sup> DOCUMENTS ON THE LAW OF WAR, 4 (Adam Roberts & Richard Guelff, eds., 3d ed. 2000) (citing Treaty of Amity and Commerce between Prussia and the United States, Sept. 10, 1785, art. 23, 49 CTS 349-52).

<sup>6</sup> Friedman, *supra* note 3, at xiv.

<sup>7</sup> YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT, 12 (2004) [hereinafter DINSTEIN, THE CONDUCT OF HOSTILITIES]. Professor Dinstein argues that the histories of so-called Geneva and Hague law intersect so frequently as to render the distinction meaningless. *Id.* The overlap is especially evident in the development of legal protections for wounded and prisoners of war. *Id.* at 12-13 (tracing wounded protections from Geneva 1864 to Hague Convention X and back to Geneva Convention II of 1949) (tracing prisoner of war protections from Chapter II of Regulations annexed to Hague Conventions I and IV to Geneva Convention 1929 and finally to Geneva Convention III of 1949); HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 217 (1992) (noting the Hague/Geneva distinction as “somewhat artificial”).

<sup>8</sup> George H. Aldrich & Christine M. Chinkin, *The Hague Peace Conferences: A Century Of Achievement And Unfinished Work*, 94 A.J.I.L. 90, 93 (2000) (stating “For example, the relevant provisions of the 1899 and 1907

- b) Civilian protection has **not** been a focus of the Hague. Only those provisions of the Hague Regulations dedicated to limiting the power of occupying powers directly address protections for civilians.<sup>9</sup> Discussing the Hague – Geneva dichotomy, one author has noted that civilians also benefit under the Hague Regulations restrictions on bombardment.<sup>10</sup>

2. **The Geneva Tradition** In June 1859, the Swiss businessman Henry Dunant (1828 – 1910) witnessed first-hand the carnage of the Battle of Solferino. Moved by the suffering of the battle’s casualties and mindful of the inadequate medical services to treat wounded, Dunant published *Un Souvenir de Solférino* (A Memory of Solferino).<sup>11</sup> Dunant’s book ultimately inspired conventions to establish the Red Cross and, later, the first Geneva Convention. European international lawyers, international courts, and especially non-governmental organizations (NGOs) increasingly refer to the Geneva Tradition as **International Humanitarian Law (IHL)**.<sup>12</sup>

---

Hague Conventions on the Laws and Customs of War on Land became accepted in practice so that, by 1945, the international tribunal trying Germans accused of war crimes was able to hold that Hague Convention No. IV and its annexed Regulations had become part of customary international law binding on Germany, even though the Convention as such was not applicable to the Second World War.”) (citing United States v. Von Leeb [High Command Case], 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10, 462 (1950); see also 2 LASSA OPPENHEIM, INTERNATIONAL LAW 234-36 (Hersch Lauterpacht ed., 7th ed. 1952)).

<sup>9</sup> See 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, section III, arts 43, 45 – 47, & 50, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague IV]. Article 43 charges the occupant with maintaining public order and safety. *Id.* at art. 43. Article 45 forbids forced oaths of allegiance to the occupant. *Id.* at art. 45. Article 46 preserved “family honor, ... lives of persons, ... private property, as well as religious convictions ....” *Id.* at art. 46. Article 47 forbids pillage. *Id.* at art. 47. Article 50 prohibits collective punishment of the population. *Id.* at art. 50.

<sup>10</sup> MCCOUBREY, *supra* note 7, at 219. The authors do not cite specific articles of the Hague Regulations, however, probably intend to cite articles 25 through 27. Article 25 prohibits attack or bombardment of undefended dwellings or villages. Hague IV, *supra* note 9, at art. 25. Article 26 mandates warnings prior to bombardments, except in cases of assault. Hague IV, *supra* note 9, at art. 26. Article 27 protects hospitals, religious buildings and objects and buildings of cultural significance. Hague IV, *supra* note 9, at art. 27. None of the articles specifically mentions civilians (or even inhabitants) as such yet civilians would likely benefit from an attacker’s observation of these limitations on bombardments.

<sup>11</sup> *Id.*

<sup>12</sup> The term “IHL” has not gained universal usage in the United States. The Department of Defense (DOD) and the Army Judge Advocate General’s Legal Center and School (TJAGLCS) continue to use the broader terms “law of war” or “law of armed conflict” when referring to treaties and norms drawn from either the Hague or Geneva Traditions. As a label, IHL has drawn criticism for suggesting that all laws of war “are—or have to be—truly humanitarian in nature.” DINSTEIN, THE CONDUCT OF HOSTILITIES, *supra* note 7, at 13. Professor Dinstein notes that many rules restricting conduct during hostilities emphasize competing values such as military necessity. *Id.*

- a) Inspired by Dunant’s observations, the **Geneva Convention of 1864**<sup>13</sup> focused exclusively on the protection of wounded and sick soldiers during armed conflict. While the Convention codified practices with respect to wounded and sick that are still observed today, civilians enjoyed protection under the Convention only to the extent they aided wounded soldiers. Article 5 of the 1864 Convention states, “Inhabitants of the country who bring help to the wounded shall be respected and shall remain free.”<sup>14</sup> Thus, although civilians gained some protection under the Convention, they were only protected in a **collateral** or **derivative sense** by virtue of their support to wounded combatants.
- b) In 1906, a diplomatic conference met to **replace** and expand the ten articles of the 1864 Convention to thirty-three articles, resulting in the **1906 Geneva Convention**.<sup>15</sup> Article 5 of the 1906 Convention retained the derivative protection and “certain immunities” previously offered to **civilians** offering care to the sick and wounded.<sup>16</sup>
- c) Neither the **1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field**,<sup>17</sup> nor the **1929 Geneva Convention Relative to the Treatment of Prisoners of War**,<sup>18</sup> which **replaced** the 1906 Convention, contained protections specifically applicable to civilians with the exception of the above-mentioned protections for

---

Dinstein further notes that the term IHL may falsely imply that the law of war concerns “protection of human rights in armed conflicts.” *Id.* at 20. Dinstein notes that human rights law is a separate regime of protection. *Id.* See also INT’L & OPERATIONAL L. DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, II GRADUATE COURSE DESKBOOK, Tab O (Human Rights) (2004) (discussing separate protections under human rights during armed conflict).

<sup>13</sup> Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 18 Martens Nouveau Recueil (1e ser.) 612, *translated and reprinted in* THE LAWS OF ARMED CONFLICTS 279 (Dietrich Schindler & Jiri Toman eds., 3d rev. ed. 1988).

<sup>14</sup> *Id.* art. 5.

<sup>15</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 6 July 1906, 35 Stat. 1885, 1 Bevans 516.

<sup>16</sup> *Id.* art. 5.

<sup>17</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303 [hereinafter GC 1929].

<sup>18</sup> Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 LNTS 343 [hereinafter GC III].

those rendering aid to the sick and wounded.<sup>19</sup> In 1921, the International Committee of the Red Cross (ICRC) proposed a convention dedicated to the protection of civilians. The draft convention included protections from deportation, execution and conferred rights to exchange correspondence and to receive relief supplies. States rejected the addition, arguing that to address the status of civilians in wartime would seem a betrayal of “the cause of peace.”<sup>20</sup>

d) In 1934, the ICRC drafted a more comprehensive convention aimed at protecting civilians. The Committee was unable, however, to persuade a significant number of states to participate until mid-1939, with a diplomatic conference planned for early 1940. The outbreak of the Second World War prevented the conference from taking place.<sup>21</sup>

e) **1949 Fourth Geneva Convention –**

(1) As shown above, prior to and during the Second World War, the Geneva Conventions essentially limited legal protection during armed conflict to the wounded and prisoners of war. **Changes in warfare** exposed civilians as greatly under-protected in the existing scheme of the law of war. Large-scale, **aerial bombardment** exposed civilian dwellings, previously out of reach, to targeting and extensive destruction. **Mechanized maneuver warfare** greatly expanded the battlefield and permitted armies quickly to envelope (often unintentionally) fleeing enemy civilian populations. The most compelling factor in the decision to include civilians in the Geneva Conventions, however, was the abominable fate that civilians suffered while at the hands of their nations’ enemies.<sup>22</sup> Following

---

<sup>19</sup> The 1929 Convention did, however, slightly modify the language of the 1906 Convention, eliminating “immunity” for such civilians and substituting “certain facilities.” GC 1929, *supra* note 17, at art. 5. Pictet’s commentary to Geneva Convention I, 1949 indicates that the change reflected a desire to eliminate doubt or controversy regarding immunity, preferring to rely on “the vaguer and more general word ‘facilities’, which left Commanding Officers a freer choice.” COMMENTARY, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD, 212 (Jean S. Pictet ed., 1958).

<sup>20</sup> COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 4 (Jean S. Pictet ed., 1958) [hereinafter GC IV COMMENTARY].

<sup>21</sup> *Id.* The proposed convention is referred to as the “Tokyo Draft.” *Id.*

<sup>22</sup> “World War II, with the associated Holocaust, produced at least forty million deaths. As many as 1,700 cities and towns and 70,000 villages were devastated in the Soviet Union. Over 40 percent of the buildings were destroyed in

the experience of the Second World War, civilians could no longer be said to derive sufficient “gratuitous benefit” from law of war restrictions making destruction of enemy armed forces the sole legal object of conflict.<sup>23</sup>

- (2) The Fourth Geneva Convention (GC IV), therefore, emerged to protect “a strictly defined category of civilians from arbitrary action on the part of the enemy . . . .”<sup>24</sup> **The main purpose of GC IV is to protect civilians “under the control of an enemy State.”**<sup>25</sup> Pictet’s commentary to GC IV notes a conscious decision to leave out any protection for civilians from the dangers of military operations themselves. “Anything tending to provide such protection was systematically removed from the Convention.”<sup>26</sup> Such matters, while of admitted value, were thought better left to the Hague Tradition of the law of war.<sup>27</sup>

3. **Merger of Hague and Geneva Traditions** – Gaps in the protection of civilians offered by the Hague and Geneva Traditions became obvious soon after the 1949 Conventions took effect.<sup>28</sup> Following the failure of the

---

forty-nine of Germany's largest cities and many suffered much worse." JOHN NORTON MOORE, SOLVING THE WAR PUZZLE 91 (2004).

<sup>23</sup> At the outset of the effort to revise the Geneva Conventions in 1945, Max Huber, President of the International Permanent Court of Justice, stated, “War, as it becomes more and more total, annuls the differences which formerly existed between armies and civilian populations in regard to exposure to injury and danger.” GC IV COMMENTARY, *supra* note 20, at 5.

<sup>24</sup> *Id.* at 10.

<sup>25</sup> *General Problems in Implementing the Fourth Geneva Convention*, Report by the Int’l Comm. of the Red Cross Meeting of Experts, Geneva, ¶ 1(a), (27 October 1998) at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/7E9D0ED1449F156AC1256B66005C349E>.

<sup>26</sup> GC IV COMMENTARY, *supra* note 20, at 10.

<sup>27</sup> It appears that the ICRC did not intend, however, to rely entirely on the Hague Tradition to regulate civilian protection from the effects of hostilities. The commentary to GC IV indicates that while the ICRC prepared the draft GC IV, they were simultaneously working on measures to protect civilians from “dangers inherent in modern warfare” and aerial bombing. *Id.* at 11. These efforts ultimately produced the “Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War.” *Reproduced in* DIETRICH SCHINDLER & JIŘI TOMAN, *THE LAWS OF ARMED CONFLICT*, 251 (1988).

<sup>28</sup> The need for a more comprehensive civilian protection regime was highlighted in the official commentary to the Protocols: “The 1949 Diplomatic Conference did not have the task of revising the Hague Regulations . . . This is why the 1949 Geneva Conventions only deal with the protections to which the population is entitled against the effects of war in a brief and limited way . . . The fact that the Hague Regulations were not brought up to date meant that a serious gap remained in codified humanitarian law. This has had harmful effects in many armed conflicts

1956 Draft Rules to achieve widespread acceptance, the ICRC undertook a comprehensive review of the 1949 conventions. **Additional Protocols I and II to the 1949 Geneva Conventions**<sup>29</sup> reaffirm and supplement the civilian protections of the 1949 Conventions. The Additional Protocols reflect the ultimate convergence of the Hague and Geneva traditions for protecting civilian victims of warfare.

- a) **Part IV of Protocol I**, entitled “Civilian Population” represents the intersection of both the Hague/targeting method, and the Geneva/”respect and protect” method. Part IV is the longest of the six parts of Protocol I and comprises nearly one-third of the treaty.<sup>30</sup>
- b) Developing rules based on a combination of both these methods was deemed essential to ensure comprehensive protection for non-combatants subject to the dangers of warfare.
- c) One of the main objectives of Protocol I was to fill the void related to protecting persons and property from enemy lethality.<sup>31</sup> For a detailed discussion of the civilian protections from the effects of targeting and hostilities **see the “Means and Methods” chapter of this deskbook or Operational Law Handbook, Chapter 2, The Law of War or Law of War Handbook, Chapter 7, Means and Methods.**

### III. DEFINITION OF CIVILIAN

- A. **The long road to a definition.** Although the concept of distinction between combatants and civilians lies at the very foundation of the law of war, **the Fourth Geneva Convention of 1949** contains **no definition** of who falls within the

---

which have occurred since 1949 . . . .” COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 587 (Yves Sandoz, et al, eds., 1987)[hereinafter AP COMMENTARY].

<sup>29</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, 1125 UNTS 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

<sup>30</sup> AP COMMENTARY, *supra* note 28, at 583. The commentary further labels Part IV “the crowning achievement of the Diplomatic Conference of 1974-1977.” *Id.*

<sup>31</sup> *Id.* “[T]he ICRC, the initiator of the Geneva Conventions, adopted as one of its main objectives the filling of this glaring gap when it decided in 1967 to undertake a new step in the development of humanitarian law, even if this meant going beyond the classical traditions of Geneva Law.” *Id.*

category of civilian.<sup>32</sup> Many provisions refer to protections afforded to certain categories of civilians, but it seems the definition of “civilian” was left to common sense.

B. **The Protocol I Definition** – By 1974, it was apparent that the GC IV approach was inadequate, and that the lack of definition jeopardized the principle of distinction.<sup>33</sup>

1. **Article 50(1)** of Additional Protocol I (AP I) states:

*A civilian is any person who does not belong to one of the categories referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol.*

a) Article 50 adopts a “negative” definition. The following persons, therefore, **do not qualify as “civilians”** for purposes of the law of war:

(1) Members of the armed forces of parties to the conflict;<sup>34</sup>

(2) Members of militias and organized resistance movements belonging to a Party to the conflict;<sup>35</sup>

---

<sup>32</sup> Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 381 (2004).

<sup>33</sup> Commentary to Protocol I remarks: “As we have seen, the principle of the protection of the civilian population is inseparable from the principle of the distinction which should be made between military and civilian persons. In view of the latter principle, **it is essential to have a clear definition of each of these categories**” AP COMMENTARY, *supra* note 28, at 610 (emphasis added).

<sup>34</sup> See GC III, *supra* note 18.

<sup>35</sup> *Id.* art. 4(A)(2). Note that to qualify under article 4, militias and organized resistance movements must meet four criteria outlined in sub-paragraphs (a) through (d). These criteria include: being commanded by a person responsible for his subordinates; having a distinctive insignia visible at a distance; carrying arms openly; and conducting operations in accordance with the laws of war. *Id.* art. 4(A)(2)(a),(b),(c), and (d). Professor Yoram Dinstein argues that Article 4 actually carries seven criteria including each of the above-listed in as well as “organization,” “belonging to a Party to the conflict,” and “lack of duty of allegiance to the Detaining Power.” DINSTEIN, *THE CONDUCT OF HOSTILITIES*, *supra* note 7, at 36-37. Professor Dinstein’s first additional condition builds on the first condition of Article 4(A)(2), ensuring that lawful combatants operate under a hierarchy, “embedded in discipline.” *Id.* at 9 Professor Dinstein’s second additional criterion is drawn directly from the text of Article 4. *Id.* at 39-40 (citing *Military Prosecutor v. Kassem and Others*, Israel Military Court, 42 ILR 470 (1969)). Dinstein draws his final condition on POW and lawful combatant status for militias not from the Geneva Conventions themselves, but from a 1967 case from the Privy Council. *Id.* at 40 (citing *Public Prosecutor v. Koi et al.* (1967), [1968] AC 829). Dinstein observes that in *Koi*, the Privy Council held that persons owing a duty of allegiance, such as nationals of the Detaining Power, were not entitled to POW status as a matter of customary

- (3) Members of regular armed forces belonging to governments not recognized by the Detaining Power;<sup>36</sup> and
- (4) Inhabitants of non-occupied territory who spontaneously take up arms to resist invading forces; so-called *leveés en masse*.<sup>37</sup>

b) Thus, **Article 50 of AP I includes all persons not qualifying under one of the above four categories as civilians.**

c) The final clause of Article 50(1) creates a presumption in favor of civilian status. “In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”

C. **Civilian – a “perishable” status.** The protection afforded civilians is not absolute. According to the official commentary: “The immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts. Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces. **Thus a civilian who takes part in armed combat, either individually or as part of a group, thereby becomes a legitimate target . . .**”<sup>38</sup>

1. **United States Position:** The Department of Defense Law of War Working Group has chosen “**active part**” as the legally accurate term to express that point at which a civilian’s involvement in hostilities subjects her to lawful, intentional attacks.<sup>39</sup>

---

international law. *Id.* The Privy Council found support for the idea that prisoners of war are not nationals of the detaining power in GC III, Articles 87 and 100. *Id.*

<sup>36</sup> GC III, *supra* note 18, art. 4(A)(3).

<sup>37</sup> GC III, *supra* note 18, art. 4(A)(6). *Leveés en masse* must observe two of the conditions applied to militias and organized resistance movements: carrying arms openly; and conducting themselves in accordance with the law of war. *Id.*

<sup>38</sup> AP COMMENTARY, *supra* note 28, at 618.

<sup>39</sup> Dep’t of the Army, Office of the Judge Advocate General, Int’l Law Dep’t, Memorandum, Subject: Law of War Status of Civilians Accompanying Military Forces in the Field (May 6, 1999)(on file with author)[hereinafter DA Memo].

- a) “Active” participation is characterized as, “Entering the theatre of operations in support or operation of sensitive, high value equipment, such as a weapon system.”<sup>40</sup>
- b) Employment and deployment of civilians accompanying armed forces have tested the boundaries of the **active part test**. DOD Law of War Working Group guidance illustrates that these civilians’ functions occur along a **spectrum of actions** that may compromise their immunity from intentional attack. The working group concedes that **there is no clear point** at which it may be said that a civilian accompanying the force” is taking an active part in hostilities.<sup>41</sup> Relevant factors may include:
  - (1) Geographic proximity of service provided to units in contact with enemy;<sup>42</sup>
  - (2) Proximity of relationship between services provided and harm resulting to enemy;
  - (3) Temporal relation of support to enemy contact or harm resulting to enemy.
- c) The working group’s guidance indicates that whether a particular civilians’ contributions to the force constitute taking an active part in hostilities should be considered from the perspective of the likely attacker
- d) Field Manual 100-21, Contractors on the Battlefield (January 2003), states that **contractors cannot “take an active role in hostilities but retain their inherent right of self defense.”**<sup>43</sup>

- 2. **Majority Position:** According to AP I, Article 51(3), civilians enjoy the protection of this section (providing general protection against dangers arising from military operations) **unless and for such time as they take a**

---

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 4.

<sup>42</sup> For instance, a civilian truck driver delivering ammunition from a stateside depot to an Army post with units preparing to deploy would likely not constitute taking an active part in hostilities. A civilian delivery of the same ammunition from a deployed forward supply point to the First Sergeant of a unit in contact and low on ammunition, however, would likely satisfy the active part test for taking part in hostilities.

<sup>43</sup> DEP’T OF THE ARMY, FIELD MANUAL 100-21, CONTRACTORS ON THE BATTLEFIELD, para 6-2 (Jan. 2003).

**“direct” part in hostilities.** The United States has not ratified AP I and does not subscribe to the direct part test. The test remains relevant to U.S. operations, however, as many **U.S. allies are parties to AP I** and apply the “direct part” test during coalition operations.

- a) The official commentary explains “direct part” as “acts of war which by their nature or purpose are **likely to cause actual harm to the personnel and equipment of the enemy** armed forces.”<sup>44</sup>
- b) The direct part test is generally agreed to capture **less** civilian activities than the active part test, thereby subjecting less civilian functions to intentional targeting. The direct part test **attaches greater significance to intervening causes** of harm to the enemy than the active part test.<sup>45</sup>
- c) The official commentary then excludes “**general participation in the war effort**” from this definition:

*“There should be a clear distinction between direct participation in hostilities and participation in the war effort . . . in modern conflicts, many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context.”*<sup>46</sup>

Examples of “general participation in the war effort,” that do not constitute direct participation include:

- (1) employment in munitions factories;
- (2) participation in rationing/conservation efforts;
- (3) expressions of support for enemy government;

---

<sup>44</sup> *Id.* at 619.

<sup>45</sup> For instance, the direct part test would likely view a soldier’s employment and operation of a weapon system on the battlefield as in intervening cause between a civilian’s maintenance of that weapon system and resulting harm to an enemy. The factors listed above in the active part standard, such as proximity of service to units in contact, however, remain relevant to the direct part test. Routine maintenance or calibration of a weapon system would likely not be considered taking a direct part in hostilities. Clearing a jammed weapons system or repairing a malfunction during contact, however, might constitute taking a direct part.

<sup>46</sup> *Id.*

- (4) provision of purely administrative or logistical support to forces not deployed in hostile territory.<sup>47</sup>

- d) It is important to understand that while the above persons are typically considered as **not taking direct part in hostilities**, they are merely immune from being intentionally targeted themselves. By virtue of their place of employment or co-location with combatants, they may become, and often are, incidentally injured or killed by lawful attacks on the military objectives or combatants (both lawful targets) they support.

D. **US Bottom Line:** Those intending to cause actual harm to the personnel and/or equipment of the enemy lose their protections as civilians under the law of war while taking an active part in hostilities.

E. **“Civilian” as a perishable status – an alternate view:** While most international lawyers agree that civilian **protections** may be suspended, especially while such civilians take an active/direct part in hostilities, several commentators question the notion that civilian **status** is perishable.<sup>48</sup> The following have been offered in support of the view that while civilians may temporarily forfeit certain protections, they cannot forfeit their status:

1. The law of war only provides for two statuses: combatant and civilian. AP I, article 50’s negative definition of civilian reinforces that **everyone** who does not meet the criteria of lawful combatants entitled to POW status is, by default, a civilian.
2. GC IV, Article 5 anticipates saboteurs and spies who meet the nationality criteria of protected persons.<sup>49</sup> Rather than divest such persons of their status as civilians or protected persons, article 5 permits the detaining power to suspend protections that prove inconsistent with its security.
3. The Army’s Law of War manual, FM 27-10, corroborates this alternative view. The analysis of the definition of protected persons states:

---

<sup>47</sup> The law of war has long recognized logistical assistance from civilians accompanying armed forces as lawful conduct.

<sup>48</sup> Knut Dörmann, *The Legal Situation of ‘Unlawful/Unprivileged Combatants’*, 85 INT’L REV. RED CROSS 849 (2003). Dörmann strongly contests the view that unlawful combatants fall outside the coverage of GC IV.

<sup>49</sup> Geneva Convention Relative to the Protection of civilian Persons in Time of War Aug. 12, 1949, 6 U.S.T. 3516, art. 5 [hereinafter GC IV] .

*Subject to qualifications set forth in paragraph 248 (paragraph 248 discusses derogations under GC IV, art. 5) those protected by GC [IV] also include all persons who have engaged in hostile belligerent conduct but who are not entitled to treatment as prisoners of war.*<sup>50</sup>

- F. **DOD Response** – Under GC IV, article 4, protected persons may exist only in two contexts: in territory of their enemy; in occupied territory.<sup>51</sup> This construct leaves unprotected, citizens of belligerent powers in their own, unoccupied territory. The drafting history of the Conventions further supports the notion of “extra-Conventional” persons.<sup>52</sup>

#### IV. PROTECTING ALL CIVILIANS IN ALL CONFLICTS

- A. **Common Article 3 Standard of Basic Humanitarian Protections.** Originally intended to serve as the preface to the Geneva Conventions (it was to provide the purpose and direction statement for the four conventions), it was instead adopted as the law to regulate the controversial “non-international conflicts” (civil wars).

1. **Common Article 3:** Known as Common Article 3 because it appears in all four of the 1949 Geneva Conventions, Article 3 is also referred to as a “Convention in miniature” because its language contains both its trigger for application as well as its protections.<sup>53</sup> Common Article 3 mandates the following minimum protections during internal armed conflict:

- a) No adverse distinction based upon race, religion, sex, etc.;
- b) No violence to life or person;
- c) No taking hostages;
- d) No degrading treatment;

---

<sup>50</sup> DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para.247 (18 July 1956).

<sup>51</sup> See Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT’L L. 1025 (2004). Callen argues persuasively that neither Dörmann’s over-inclusive view of protected persons, nor the Bush administration’s under-inclusive application of the Conventions to the 2001 Afghanistan conflict is true to the text and drafting history of the 1949 Conventions. *Id.* at 1028.

<sup>52</sup> *Id.* at 1047-65 (citing 2 Final Record of the Diplomatic Conference of Geneva of 1949, A (1949)).

<sup>53</sup> GC IV COMMENTARY, *supra* note 20, at 34. (borrowing the phrase from a delegate to the 1949 Diplomatic Conference).

- e) No passing of sentences in absence of fair trial, and;
- f) The wounded and sick must be cared for.

2. **Application to Any Armed Conflict.** In 1986, the International Court of Justice held that Common Article 3 serves as a “minimum yardstick” of protection in all conflicts, not just internal armed conflicts.<sup>54</sup>
3. **Re-affirmation of ICJ:** In 1995, the International Criminal Tribunal for the Former Yugoslavia endorsed the extension of common article 3 to international armed conflict in the Appeals Chamber decision in the *Tadic* case:

*“The International Court of Justice has confirmed that these rules [common article 3] reflect ‘elementary considerations of humanity’ applicable under customary international law to any armed conflict, whether it is of an internal or international character.”*<sup>55</sup>

4. This expanded view of Common Article 3 is consistent not only with U.S. policy (which extends its application even into non-conflict operations other than war through DoDD 5100.77 and CJCSI 5810.01B), but also with the original understanding of its scope as expressed in the official commentary to the Geneva Conventions of 1949. According to Jean Pictet:

---

<sup>54</sup> Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. Reports 14, paras 218-19 (June 27). The court stated:

Article 3 which is common to all four Geneva conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the even of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity’ (Corfu Channel, Merits, I.C.J. Reports 1949 p. 22; para 215). The Court may therefore find them applicable in the present dispute.

*Id.* para. 218. Scrutinizing United States involvement in Nicaragua, clearly two “high contracting parties,” the Court noted, “The relevant principles are to be looked for in the provisions of Article 3 of each of the four Conventions of 12 August 1949, the text of which, identical in each Convention, expressly refer to conflicts not having an international character.” *Id.* para 219.

<sup>55</sup> Prosecutor v. Dusko Tadic A/K/A “Dule”, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case No. IT-94-1-AR72, (2 October 1995) (quoting Nicaragua v. United States at para 218).

*“This minimum requirement in the case of a non-international armed conflict, is a fortiori applicable in international conflicts. It proclaims the guiding principle common to all four Geneva Conventions, and from it each of them derives the essential provision around which it is built.”*<sup>56</sup>

- B. **The Protocol I “safety net:”** Prior to the expansion of the protections of Common Article 3 to international armed conflict by the decisions of the ICJ and ICTY, Common Article 3 could not be considered to apply, as a matter of law, to international armed conflict. Thus, there was an absence of an explicit guarantee of humane treatment for all civilians during international armed conflict.
1. The Response: **Article 75 of Protocol I.** The drafters of Protocol I included an article almost identical to Common Article 3 of the 1949 Conventions. The purpose was to establish an explicit mandate for humane treatment of **any and all civilians** during international armed conflict, **regardless of which party to the conflict had power over them.**
  2. Article 75 is in a sense a “safety net,” ensuring that no civilian falls through the “cracks” in terms of their right to humane treatment during an international armed conflict. **Note: For those states not a party to Protocol I, the ICJ and ICTY decisions replace the Article 75 safety net with the broader application of Common Article 3.**
  3. Expanded due process guarantees. While Common Article 3 speaks in very general terms about the right to due process, Article 75 is much more explicit and extensive in its enunciation of due process rights for individuals deprived of liberty during an international armed conflict.
- C. **Protocol II, Article 4:** While the United States is not a party to Protocol II, it has not registered objections to Article 4. Reaffirming and expanding the principles set forth in Common Article 3, Article 4 prohibits the following actions in **internal armed conflict:**
1. **Violence to life, health and physical or mental well-being;**
  2. **Murder, cruel treatment, torture, mutilation and corporal punishment;**

---

<sup>56</sup> GC IV COMMENTARY, *supra* note 20, at 14.

3. **Collective punishment, taking hostages, actor of terrorism;**
4. **Humiliating/degrading treatment, rape, enforced prostitution and indecent assault;**
5. **Slavery/slave trade, pillage, and threats to commit any of the foregoing.**

D. **Protocol II, Article 13:** While the United States is not a party to Protocol II, it has not registered objections to Article 13. Article 13 represents the intersection of the Hague and Geneva traditions for internal armed conflict. The article codifies general principles of protection against the effects of targeting and methods of warfare previously left to the Hague tradition and customary international law.<sup>57</sup>

1. **Para 1.** – lays down the principle of general protection for civilians from dangers associated with military operations. “Civilians” is intended to be a broad term, covering all who hold that status, “without any distinction.”<sup>58</sup>
2. **Para 2.** – codifies the law of war **principle of distinction** and applies it to internal armed conflict. Article 13, paragraph 2 is the source of the prohibition on intentional targeting of civilians. Analogous to AP I, Article 48. Note, however, that incidental effects on civilians resulting from lawful attacks on military objectives are not prohibited by paragraph 2.
3. **Para 3.** – adopts the AP I, article 51(3) “direct part” test for determining when civilians forfeit their protection from intentional attacks. Note that, as with AP I, article 51(3), protection is only forfeit, “for so long as” such civilians take a “direct part” in hostilities. The United States has not objected specifically to paragraph 3, however, one would expect the United States to use the “**active part**” test in applying this provision.<sup>59</sup>

E. **Bottom Line:** All non-combatants, including civilians in areas involved in either internal or international armed conflict, are entitled to humane treatment when subject to the power of any party to that conflict. Although this is a very low standard of protection, its comprehensive application is a dramatic change in the law of war from its original application after the 1949 Geneva Conventions.

---

<sup>57</sup> AP COMMENTARY, *supra* note 27, at 1448.

<sup>58</sup> *Id.*

<sup>59</sup> *See infra* Part III.C.1. (discussing “active part” standard for evaluating civilian participation in hostilities).

# Internal Armed Conflict

## 1990 Kurdish Rebellion

**Who:** all “civilians not taking active part in hostilities”

**Law:**

- **GC IV, Common Article 3**
- **Protocol II, Arts 4 & 13**



The above slide illustrates legal protections under the law of war for all civilians during internal armed conflict.

## V. PROTECTING ALL CIVILIANS IN INTERNATIONAL ARMED CONFLICT

- A. **Common Article 3** – *see discussion supra*.
- B. **Additional Protocol I, Article 75** – *see discussion supra*, Part IV, B.
- C. **GC IV, Part II - Protection of the Entire Population:** Although the Fourth Geneva Convention was the first law of war treaty devoted exclusively to the protection of civilians, with the exception of Common Article 3 as discussed above, **only Part II of the treaty applies to every civilian in the area of conflict.**

1. **Article 15 of GC:** Provides for, but does not mandate, the establishment of “**neutralized zones**” (temporary zones in the area of combat) to shelter from the effects of war:
  - a) Wounded and sick combatants and non-combatants;
  - b) Civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.
2. **Article 14 of GC:** Provides for, but does not mandate, the establishment of “**hospital/safety zones**” (Permanent structures establish outside combat area) to shelter from the effects of war “**Special Needs**” civilians:
  - a) Mothers of children under seven;
  - b) Wounded, sick, and infirm;
  - c) Aged;
  - d) Children under the age of 15; and
  - e) Expectant mothers.
3. **Further Protections of the Entire Population:** In addition to providing for the establishment of these “protected” zones, Part II also mandates the following protections:
  - a) The wounded, sick, infirm and expectant mothers must be “respected and protected” by all parties to the conflict at all times (GC, Art 16).
  - b) Agreements should be reached to allow for removal of special needs individuals from besieged areas and the passage of ministers and medical personnel to such areas. (GC, Art. 17).
  - c) Civilian Hospitals shall not be the object of attack. (GC, Art. 18).
  - d) Allow passage of consignments of medical supplies, foodstuffs and clothing. (GC, Art. 23).

- e) Protection and maintenance of orphans or those separated from their family who are under the age of 15. (GC, Art. 24).
- f) Rights to communicate with family via correspondence (GC, Art. 25).

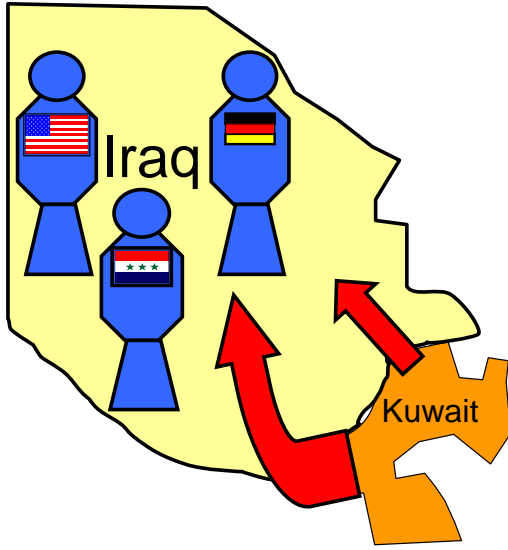
## International Armed Conflict

**2003: Coalition invades Iraq**

**Who: Population of Iraq**

**Protection:**

- GC IV, Common Art 3
- Protocol I, Art 75
- GC IV, Part II



The above slide illustrates protections under the law of war for all civilians during international armed conflict.

## VI. STATUS AND TREATMENT OF “PROTECTED PERSONS”

- A. **Part III Protections:** The bulk of the protections (Articles 27 – 141) of the Fourth Geneva Convention are found in Part III and deal exclusively with “protected persons.” Although the substantive protections of Part III of GC IV are straight-forward and, for the most part, intuitive to the situation of those they protect, the scope of application of Part III is complex and unsettled.
- B. **Key Definitions & Principles:** Understanding who is classified as a protected person under the Convention is simplified by understanding the theory behind the

classification. Recall that the state is the focal point of the international legal system. One of the prerogatives of a state is the ability to champion the rights of its citizens through diplomatic channels. The Fourth Geneva Convention presumes that upon outbreak of armed conflict between two states, these diplomatic channels will be severed. Therefore, the civilians of each party to the conflict who find themselves under the control of their nation's enemy lose the ability to seek redress for wrongs through diplomatic channels. "Protected person" status thus steps in to fill this vacuum. It is the mechanism designed to ensure these civilians do not lose the benefit of international legal protections. Therefore, to determine the status of a civilian, the following definitions must be understood and applied:

**1. Protected Persons** (GC IV, Art. 4, para. 1). "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever find themselves, in case of conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals." **Based on this definition, the following qualify as protected persons:**

- a) Civilian enemy nationals within the national territory of each of the parties to the conflict.

**Example:** Iraqi students in the US at the outset of the 2003 Iraq War. **Note:** Nationals of a neutral or co-belligerent State are not protected persons if their country has normal diplomatic relations with the State in which they are located.

- b) The population of occupied territories, excluding nationals of the occupying power and co-belligerents.

**Example:** In the case of Operation Iraqi Freedom, once Iraq was occupied, all civilians in Iraq who were not nationals of the States that comprised the coalition became protected persons.

- c) Some have argued that protected persons may only be found as belligerent parties' aliens in enemy territory and in occupied territory. This restricted reading of the Article 4 definition of "protected person" is supported at once by the derogations provisions of Article 5 and by the general structure of Part III. Both Article 5 and Part III elaborate on treatment of protected persons by bifurcating them into two categories:

- (1) nationals of belligerents living in enemy territory and;

(2) the population of occupied territories (excluding nationals of the occupying power)

d) **Importantly**, the above-discussed bifurcation eliminates from protected person status nationals of belligerent powers seized in their own territory when it is not under an occupation. For instance, during an invasion that has not matured into an occupation, resident civilians placed under the control of the invading army would not qualify as protected persons. This analysis of Article 4, informed by Article 5 and Part III, achieves what is initially an attractive result by excluding unlawful combatants seized on an active battlefield from protected person status.<sup>60</sup> Yet the exclusion may cause concern when it operates to exclude innocent civilians from the same status.

e) **United States position:** At present, the only published DOD position interpreting Article 4 is FM 27-10, The Law of Land Warfare. Interpreting article 4, paragraph 247b. states:

*[T]hose protected by GC [IV] also include all persons who have engaged in hostile belligerent conduct but who are not entitled to treatment as prisoners of war.*

(1) Paragraph 247b. thus includes unlawful belligerents among protected persons. Moreover, the use of the phrase “all persons” suggests that the geography of capture alluded to above is not significant for determining protected person status.

(2) Although paragraph 247b. notes that protected persons’ status is subject to derogations under GC IV, Article 5, the commentary to Article 5 confirms the above conclusion regarding unlawful combatants as protected persons. Paragraph 248 addresses derogations. Sub-paragraph a. addresses unlawful combatants seized in “Domestic and Occupied Territory.” Sub-paragraph b., however, addresses “other areas” and states:

*Where, in territories other than those mentioned in a. above, a Party to the conflict is satisfied that an individual*

---

<sup>60</sup> Callen, *supra* note 51. Callen terms such persons “battlefield unlawful combatants” to distinguish them from unlawful combatants seized as aliens on the detaining power’s territory and unlawful combatants seized in occupied territory. *Id.* at 1028.

*protected person is definitely suspected of or engaged in activities hostile to the security of the State such person is similarly not entitled to claim such privileges under GC [IV] as would, if exercised in favor of such individual person, be prejudicial to the security of such State.*

Thus, paragraph 248b. clearly envisions that unlawful belligerents seized in territory other than that enumerated in Article 5, so called “other areas,” qualify for protected person status and are merely subject to the derogation provisions of other unlawful combatants.

2. **Derogations** (GC IV, art 5). In addition to outlining protected persons’ status and associated protections, GC IV provides for the suspension of protections. Generally speaking, states may suspend provisions that threaten the security of the state from protected persons who have committed hostile acts. Details on such derogations are provided for protected persons seized in two specific circumstances:
  - a) Protected persons suspected or who have engaged in activities hostile to the security of the state **in an enemy state’s territory**. In these circumstances, state may suspend any right or privilege under GC IV that would prove prejudicial to the security of the state.
  - b) Protected persons detained as spies, saboteurs, or suspected of activity hostile to an **occupying power**. In an occupation, the occupant may suspend only **rights of communication** under GC IV.
  - c) **Thus**, under Article 5, it is clear that alien unlawful combatants seized in the territory of the detaining power stand to have far more protections suspended than those seized by an occupant in occupied territory.
3. **Application of Geneva Conventions:**
  - a) **GC IV, Art. 6** - “In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations. In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations.”

- b) **AP I, Art. 3** - “The application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, at the general close of military operations and, and in the case of occupied territories, on the termination of the occupation.”

**C. Specific Articles Addressing Protected Persons:** Before review the protections available to protected persons, it is important to note that, protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the Fourth Geneva Convention. GC, Art 8.

1. **Part III, Section I – The General Standard:** “Protected persons are entitled in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated.” (GC, Art. 27).

- a) “Respect for Their Persons.” Intended to grant a wide array of rights to protect physical, moral, and intellectual integrities.” (GC, Art. 27).
- b) “Respect for Honor.” Acts such as slander, insults, and humiliation are prohibited.” (GC, Art. 27).
- c) “Respect for Family Rights.” Arbitrary acts which interfere with marital ties, the family dwelling, and family ties are prohibited. This is reinforced by GC, Art. 82, that requires, in the case of internment, that families be housed together.”<sup>61</sup> (GC, Art. 27).
- d) “Respect for Religious Convictions.” Arbitrary acts which interfere with the observances, services, and rites are prohibited (only acts necessary for maintenance of public order/safety are permitted).” (GC, Art. 27).
- e) “Respect for Custom.” Intended to protect the class of behavior which defines a particular culture. This provision was introduced in response to the attempts by World War II Powers to effect “cultural genocide.” (GC, Art. 27).
- f) No insults and exposure to public curiosity. (GC, Art. 27).

---

<sup>61</sup> In addition, if a family is divided, as a result of wartime events, they must be reunited. See Pictet at 202-203.

- g) No rape, enforced prostitution, and indecent assault on women. (GC, Art. 27).<sup>62</sup>
- h) No using physical presence of persons to make a place immune from attack. (GC, Art. 28).
- i) No physical or moral coercion, particularly to obtain information. (GC, Arts. 31 & 33).
- j) No actions causing physical suffering, intimidation, or extermination; including murder, torture, corporal punishment, mutilation, brutality, and medical/scientific experimentation. (GC, Art. 32).
- k) No pillaging (under any circumstances and at any location). (GC, Art. 33).
- l) No collective penalties. (GC, Art. 33).
- m) No reprisals against the person or his property. (GC, Art. 33).
- n) No taking of hostages (GC, Art. 34).

2. **Part III, Section II: Protections specifically for aliens within the territory of a party to the conflict.** Articles 35 through 46 are designed to protect the freedom of the alien “in so far as that freedom is not incompatible with the security of the party in whose country he is.”<sup>63</sup> This translates into affording these civilians many of the same rights and privileges as host nation civilians.

- a) Right to Leave the Territory. (GC, Art. 35). (Right is overcome by the national interests of the State (Security)).
- b) Right to Humane Treatment during Confinement. Protected persons are entitled to the quality of treatment recognized by the

---

<sup>62</sup> These protections were intended as specific examples of the heightened protection that women enjoy under Geneva IV. The general protections within the Convention cover much more than the specific protections against rape, prostitution, and indecent assault. See Commission of Government Experts for the Study of the Convention for the Protection of War Victims (Geneva, Apr. 14-26). Preliminary Documents, Vol. III 47 (1947).

<sup>63</sup> See Dep't of Army, Pamphlet 27-161-2, International Law, Volume II (23 October 1962).

civilized world, even if it exceeds the quality of treatment that a Detaining Power grants to its own citizens. (GC, Art. 37).

- c) Right to receive relief packages, medical attention, and practice of their religion. (GC, Art. 38).
- d) Right to find gainful employment, subject to security concerns. If no employment is possible, the Party shall ensure support. GC, Art. 39).
- e) Limitations on the Type and Nature of Labor. (GC, Art. 40.)
  - (1) Can only be compelled to work to the same extent as nationals.
  - (2) Cannot be forced to contribute to the war effort of their enemy.

## International Armed Conflict

**2003: Coalition invades Iraq**

**Who: “Protected Persons in Territory of Party to Conflict”**

**Protections:**

- GC IV, Common Art 3
- 1977 Protocol I, Art 75
- GC IV, Part II
- GC IV, Part III
  - Section I
  - Section II

A map showing Iraq in yellow and Kuwait in orange. A blue icon of a soldier with an American flag on his chest is positioned in Iraq. Two red arrows point from Kuwait towards Iraq, indicating an invasion.

The above slide illustrates protections under the law of war for protected persons in alien territory.

3. **Part III, Section III: Protections specifically for protected persons in occupied territories.**

- a) Inviolability of Rights. The occupying power does not have the authority to deprive protected persons of any rights derived from GC as a result of occupation. (GC, Art. 47).
- b) Right to leave if not a national of the power whose territory is occupied. (GC, Art. 48).
- c) No forcible transfers or deportations. (GC, Art. 49).
- d) Ensure care and education of children. (GC, Art. 50).
- e) May not be compelled to serve in armed forces. May not be forced to work unless 18 and for the benefit of public good. (GC, Art. 51).
- f) Must protect and respect personal property. (GC, Art 53).  
Exceptions:
  - (1) The occupying power cannot destroy “real or personal property..., except where such destruction is rendered **absolutely necessary** (GC, Art. 53).
  - (2) **Seizure.** The **temporary taking** of property, with or without the authorization of the local commander.
    - (a) Rules for State Property. (FM 27-10, paras. 402-405).
      - (i) Real Property Not of a Direct Military Use may not be seized (but occupant may administer such property) and must be safeguarded (public buildings, real estate, forests).
      - (ii) Occupying power may seize all (state owned) cash, funds, and movable property, which is capable of military use.

- (b) Rules for Private Property.
  - (i) Permitted if the property has a direct military use.
  - (ii) A receipt must be given, so that restoration and compensation can be made.
- (3) **Confiscation. Permanent taking.** Differs from seizure, which is temporary. (FM 27-10, paras. 396 & 406. Hague IV, Art. 46, Para. 2).
  - (a) State Owned Property. State property seized or captured becomes the property of the capturing nation (title passes).
  - (b) Private Property. Cannot be confiscated. In addition, threats, intimidation, or pressure cannot be used to circumvent this rule.
- (4) **Requisitions.** The use of services and property, by the order of the local commander, for the needs of the hostile or occupation army. (FM 27-10, paras. 412-417).
  - (i) May only be ordered by local commander.
  - (ii) Must, to the greatest extent possible, be paid for in cash. If cash is not available a receipt must be given, with payment made as soon as possible.
  - (iii) Use of Force. Minimum amount required to secure needed services or items.
- g) Ensure food and medical supplies. (GC, Art. 55).
- h) Permit ministers of religion to give spiritual assistance. (GC, Art 58).
- i) Permit receipt of individual relief supplies. (GC, Art 62).

- j) **Presumption of Continued Use of Indigenous Laws.** The local law (civil & penal) of the occupied territory “shall remain in force,” except in cases where such laws “constitute a threat” to the occupying power’s security. (GC, Art. 64). Sources of such law included:
- (1) Customary International Law Duty of Obedience.  
Inhabitants owe a duty of obedience to the occupant.  
However, this obligation does not require that a member of the local population act in a manner aimed to injure his displaced government.
- k) Must provide due process rights. (GC, Art. 71).

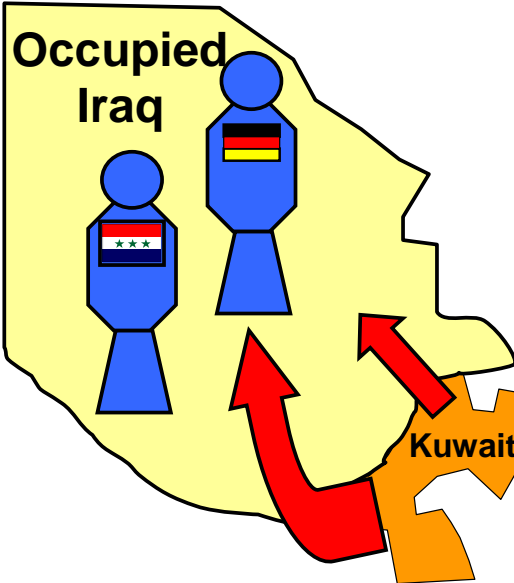
## Occupation

**2003: Coalition occupies Iraq**

**Who: “Protected Persons in Occupied Territory”**

**Protection:**

- GC IV, Common Art. 3
- 1977 Protocol I, Art. 75
- GC IV, Part II
- GC IV, Part III
  - Section I
  - Section III



The diagram shows a yellow map of Iraq labeled 'Occupied Iraq' and an orange map of Kuwait labeled 'Kuwait'. Two blue figures representing protected persons are shown within Iraq: one with the Iraqi flag and one with the German flag. Two red arrows point from Kuwait towards the occupied territory of Iraq, indicating military movement or occupation.

The above slide illustrates protections under the law of war for protected persons in occupied territory.

- D. **Depriving protected persons of their liberty:** Generally, four types of liberty deprivation are permissible with regard to protected persons:

1. Imprisonment for criminal misconduct:
  - a) Occupation Courts. (GC, Arts. 64 – 67) The occupying power may constitute military courts (nonpolitical) to try accused citizens of an occupied territory. Limitations:
    - (1) The courts must sit in the occupied territory.
    - (2) Prosecution must be based upon laws that have been “published (in writing) and brought to the attention of the inhabitants.”
    - (3) The laws must be published in the native language.
    - (4) Protecting Power shall have the right to attend the trial (must be notified of trial date).
2. Detainment: Any person captured or otherwise detained by an armed force.
  - a) Assigned residence: Equivalent of internment.
3. **GC, Part III, Section IV: Internment:**<sup>64</sup>
  - a) **Most severe form of non-penal related restraint permitted** - even if the detaining Power finds that neither internment nor assigned residence serves as an adequate measure of control, it may not use any measure of control that is more severe. (GC, Art. 41.).
  - b) Subject to periodic review (6 months) by competent body. (CG, Art 78).
  - c) Grouped as Families Whenever Possible. (GC, Art. 82).
  - d) Separate from PWs and Criminals. Internees “shall be accommodated separately from prisoners of war and persons deprived of liberty for any other reason.” (GC, Art. 84).

---

<sup>64</sup> Army Regulation 190-8: Enemy Prisoner of War, Retained Personnel, Civilian Internees and other Detainees (1 October 1997), establishes policies and planning guidance for the treatment, care, accountability, legal status, and administrative procedures for civilian internees.

- e) Proper housing. (GC, Art. 85)
- f) Sufficient food, water and clothes. (GC, Art. 89).
- g) Adequate infirmary with qualified doctor. (GC, Art. 91).
- h) Complete religious freedom. (GC, Art. 93).
- i) Right to control property and money. (GC, Art. 97).
- j) Must post convention in native language, right to petition for redress of grievances and elect internee committee. (GC, Arts. 99 – 102).
- k) Right to notify family of location and send and receive letters. (GC, Arts. 105 – 107).
- l) Laws in place continue to apply (subject to operational imperatives), internees cannot be sent to penitentiaries for disciplinary violations. (GC, Art. 117).
- m) Transfers must be done safely and notice must be given to internee's family. (GC, Art. 128).
- n) Must issue death certificates. Must conduct inquiry if death of internee is caused by sentry or other internee. (GC, Arts. 129 – 131).
- o) Internment shall cease as soon as possible after the close of hostilities. (GC, Art. 133).

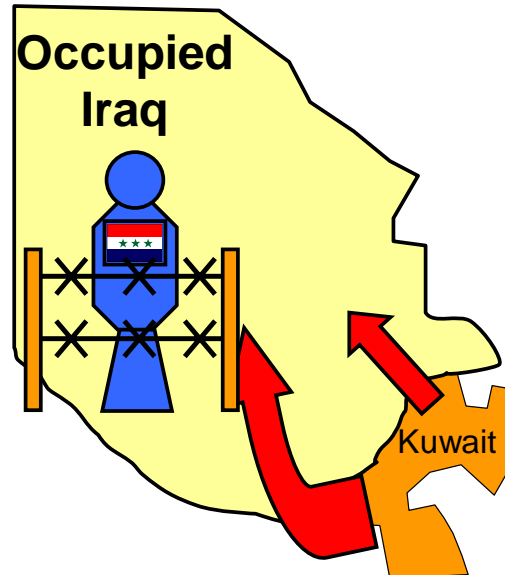
# Occupation

**Coalition interns select Iraqis during occupation (fictional)**

**Who: “Interned Protected Persons”**

**Protection:**

- GC IV, Common Art. 3
- 1977 Protocol I, Art. 75
- GC IV, Part II
- GC IV, Part III
  - Section I
  - Section III
  - Section IV



The above slide illustrates protections under the law of war for interned protected persons.

**THIS PAGE INTENTIONALLY LEFT BLANK**